LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 26 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. ~~376~~ 77

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WALTON MANUFACTURING COMPANY and
LOGANVILLE PANTS COMPANY.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WILSON, BRANCH & BARWICK,
ALEXANDER E. WILSON, JR.,
ROBERT T. THOMPSON,
615 Rhodes-Haverty Building,
Atlanta 3, Georgia,
JAckson 4-3611,
Of Counsel for Respondents.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3036

INDEX

Statement of Case	1
The Issues Raised by the Petition	2
Contentions of Respondents in Opposition to Petition for Writ of Certiorari	2
Reasons for Refusing to Grant the Writ	3
Appendix	A1

CITATIONS

Cases—

Federal Trade Commissions v. *American Tobacco Co.*, 274 U.S. 543, 544, 47 S. Ct. 663, 71 L. Ed. 1193	10
Labor Board v. *Le Tourneau Co.*, 324 U.S. 793, 65 S. Ct. 982, 89 L. Ed. 557	5
National Labor Relations Board v. *Birmingham Publishing Co.*, 5th Cir., 1958, 262 F.2d 2	7
National Labor Relations Board v. *Coats & Clark, Inc.*, 5th Cir., 1956, 231 F.2d 567	7
National Labor Relations Board v. *Columbia Products Corp.*, 141 F.2d 687 (C.A. 2)	5
National Labor Relations Board v. *Dan River Mills, Inc.*, 5th Cir., 1960, 274 F.2d 381	7
National Labor Relations Board v. *Fox Manufacturing Co.*, 5th Cir., 1956, 238 F.2d 211	7
National Labor Relations Board v. *Hearst Publications, Inc.*, 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170	5
National Labor Relations Board v. *Houston Chronicle Publishing Co.*, 5th Cir., 1954, 211 F.2d 848	7
National Labor Relations Board v. *McGahey*, 5th Cir., 1956, 233 F.2d 406	7
National Labor Relations Board v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 107, 62 S. Ct. 960, 961, 86 L. Ed. 1305	5

sequently, in April, 1961, the NLRB filed its Petition with this Court for Writ of Certiorari to the Court of Appeals. Respondents below file this Opposition to the Petition for Writ.

II. THE ISSUES RAISED BY THE PETITION.

The Petition for Writ raises the following issues:

A. Whether, despite the express statements of the Court of Appeals to the contrary, and despite the express recognition by the Court of Appeals of the valid, applicable principles of law governing review of Labor Board cases, and despite the express statement of the Court of Appeals that it was following and applying those valid, applicable principles of law, the Court of Appeals for the Fifth Circuit "grossly misapplied" that law in the present case and in a long line of other cases.

B. Whether the Court of Appeals' painstaking review of the record as a whole which led it to the conclusion and conviction that the Board's decision was not supported by substantial evidence but was based upon suspicion and surmise should be set aside upon the bare, unsupported accusation that the Court has "grossly misapplied" the law.

III. CONTENTIONS OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents contend that the Petition for Writ of Certiorari should be denied for the following reasons:

A. The Court below, as appears on the face of the decision, took cognizance of and gave effect to the valid principles of law governing the scope of review of Board decisions as contained in Section 10(e) of the National

Labor Relations Act, as amended,[1] and the controlling decisions of this Honorable Court.

B. The decision below clearly shows that the Court of Appeals fairly and properly reviewed the record as a whole, recognizing the limitations upon it as to fairly conflicting inferences and Board prerogatives, and denied enforcement not on the basis of displacing the Board's choice between two fairly conflicting views but on the basis that the Board's inferences were unreasonable, unsupported by substantial evidence and based upon suspicion and surmise.

C. The Court below did not in any way misapply the law, grossly or otherwise, in this case but to the contrary stated and properly applied the law in the highest tradition of the Federal Judiciary.

D. That a fair appraisal of the record in this case, as a whole, such as the Court of Appeals made, can only lead to the conclusion that the Board's decision is completely unsupported by substantial evidence, that the General Counsel for the Board failed to carry the burden of proof and that the decision of the Board was the result of blind adherence to rigid formulae and surmise rather than judicial reasoning and a fair evaluation of evidence.

IV. REASONS FOR REFUSING TO GRANT THE WRIT.

The true question before this Court is whether a Court of Appeals must follow the mandate of Section 10(e) of the Act and consider the record *as a whole* (which this Court has frequently said that it must do) or whether it shall be confined to such evidence in the record as may

---

1 61 Stat. 136, 29 U.S.C. 151 *et seq.*

be favorable to the Board's decision without taking into account whatever in the record fairly detracts from its weight. The Board's evidence in this case was an extremely meager amount of proof, to say the most for it. The inferences and conclusions which were drawn from that bare minimum of evidence both in the decisions of the Trial Examiner and the Board as well as in the Petition for Writ far exceed the facts. When this evidence is viewed in the light of the overwhelming evidence to the contrary, which was properly done by the Court of Appeals, it simply does not support the decision.

A reading of the opinion of the Court below clearly shows that the Court of Appeals was appalled at the complete lack of proof on the part of the Board. The basis of the refusal to enforce was not the substituting of fairly conflicting inferences but the realization that the Board had drawn unfair, illogical inferences. The inferences and conclusions of the Board were not based upon facts.

In effect, the Petitioner is contending that if there is any proof whatsoever to support the Board's decision, however meager, then the Court of Appeals must enforce. This has not been the law for a number of years.

The National Labor Relations Act, as amended, *supra*, provides in Section 10(e):

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record *considered as a whole* shall be conclusive." (Emphasis supplied)

Prior to the enactment of the Taft-Hartley Act the scope of review of Board orders tended toward a consideration of evidence viewed in isolation. As this Court said in *Universal Camera Corporation* v. *NLRB*, *supra*, at p. 478:

> "It is fair to say that by imperceptible steps regard for the fact-finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation substantiated the Board's findings."

It was under this view of the Wagner Act requirements, prior to Taft-Hartley, that the decision in *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, to which the Petitioner adverts (P. p. 18),[1] was reached. Of greater significance is the fact that the case of *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, was also prior to the Taft-Hartley amendment which expressly provided for review of the record as a whole. This Court in *Universal Camera* recognized that Congress intended to modify *Nevada Consolidated*:

> "This phraseology was adopted by the Senate. The House conferees agreed. They reported to the House: 'It is believed that the provision of the conference agreement relating to the courts' reviewing power will be adequate to provide such decisions as those in *NLRB* v. *Nevada Consol. Copper Corp.*, 316 U.S. 105, 62 S. Ct. 960, 86 L. Ed. 1305 and in the *Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation*, and *Le Tourneau*, etc., cases, *supra*, without unduly burdening the courts.' The Senate version became the law." (pp. 485-486).

Furthermore, in *Universal Camera*, this Court stated:

> "From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is

---

1 "P." denotes the Petition for Writ of Certiorari.

that now Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof.

"It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. * * *

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. * * * (pp. 487-488).

* * *

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds." (p. 490).

Surely, in view of the above language, there can be no doubt that the underlying theory of the Petition for Certiorari in this case is fallacious. The very thing about which the Petition truly complains is likewise the very thing which this Court has said the Court of Appeals is required by law to do—review the record *as a whole*—

"take into account whatever in the record fairly detracts from its weight."

The Fifth Circuit has long recognized its duty and its limitations in reviewing Labor Board orders. The Court of Appeals in this very case specifically enumerated these duties and limitations. The Court of Appeals said:

> "The resolving of evidentiary conflicts is within the province of the Board." (P. A. 23).[2]
>
> "We are aware of the requirement that we are not to overturn the Board's findings if supported by substantial evidence in the record as a whole. We recognize the principle that the substantial evidence rule applies to the choice of inferences as well as to the finding of facts as facts. *NLRB* v. *Birmingham Publishing Co.*, 5th Cir. 1958, 262 F.2d 2. We do not question the settled doctrine that the Court should not, as a general proposition, disturb the action of the Examiner and the Board in crediting or discrediting the testimony of a witness. *NLRB* v. *West Point Manufacturing Co.*, 5th Cir. 1957, 245 F.2d 783; *NLRB* v. *Newton Co.*, 5th Cir. 1956, 236 F.2d 438."
>
> "This Court has had frequent occasion to announce and develop the doctrine that if it appears that there is substantial evidence on the record as a whole to make the inference of legal or illegal discharge reasonably equal, we may not overturn the Board's finding of an illegal discharge."
>
> *N. L. R. B.* v. *Dan River Mills, Inc.*, 5th Cir. 1960, 274 F.2d 381, *N. L. R. B.* v. *Fox Manufacturing Co.*, 5th Cir. 1956, 238 F.2d 211; *N. L. R. B.* v. *Newton Co.*, 5th Cir. 1956, 236 F.2d 438; *N. L. R. B.* v. *McGehey*, 5th Cir. 1956, 233 F.2d 406; *N. L. R. B.* v. *Coats & Clark, Inc.*, 5th Cir. 1956, 231 F.2d 567; *N. L. R. B.* v. *Houston Chronicle Publishing Co.*, 5th Cir. 1954, 211 F.2d 848 (P. A. 26-27).

---

2. "P. A." denotes Appendix to Petition for Writ of Certiorari.

The Court of Appeals then proceeded to analyze the record in the light of the above-stated principles. It is difficult to conceive of a more proper exercise of the review function of the Court of Appeals. Certainly the Court left no room for even an inference that it was neither aware of nor following the principles of law which apply to a case such as this. The Court stated:

> "As we must do in these 'substantial evidence' cases, we have undertaken the tedious task of reading the record and reviewing the evidence; tedious because of the necessity of going from the Board's appendix to the employer's appendix, and so back and forth from one to the other, in an effort to piece together the isolated excerpts of testimony which each party has extracted for the purpose of supporting the position for which it contends. The Board incorporates into its appendix nineteen separate quotations from the testimony of the witness, Morris Scharff, and the employer includes thirty-seven selections, from the testimony of this witness. The same is also true, to a lesser degree, with respect to the testimony of twenty-five or more of the other witnesses. Our decision is to be based upon the record considered as a whole. Parts of the record, taken out of context, are not to be considered piecemeal, but we are to consider the record in its entirety and as a unit. This we have attempted to do." (P. A. 20).

The detailed analysis of the record clearly establishes that the Court below did study the record as a whole and did make a fair evaluation of it. The Court of Appeals stated:

> "We have the *firm conviction* that there is not substantial evidence on the record as a whole that the discharge of Mrs. Yancy was wrongful. (P. A. 30).
>
> "We reach the same conclusion with respect to Grace McCart, Pearl Coker and Ruth Brooks." (P. A. 30).

* * *

"The Examiner, however, and the Board, rejected the reasons asserted by the Respondents and found the motive for the selection of the nine committeemen was their union membership. In so doing the Board placed its own evaluations upon the factual situations, assumed managerial prerogatives, and reached the conclusions that good business judgment would not have justified the Respondents in their selections for layoff and therefore, says the Board, the motive was the unlawful one." (P. A. 34).

"We reached the conclusion that the Board's General Counsel has failed to carry the burden of showing by substantial evidence on the record as a whole that the layoffs were discriminatory. * * *." (P. A. 35).

This Court has recognized that the review of the record in Labor Board cases is the statutory function of the Courts of Appeals. In the case of *Universal Camera Corp.* v. *NLRB*, *supra*, this Court said at page 491:

"Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals."

* * *

"A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work." (pp. 488-489).

Again in *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, this Court stated at page 502:

"* * * The court painstakingly reviewed the record and unanimously concluded that the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not, on the consideration of the whole record, be deemed to be supported by 'substantial' evidence.

"Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders."

* * *

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U.S. 543, 544, 47 S. Ct. 663, 71 L. Ed. 1193."

The Petition for Writ of Certiorari alleges that the Court of Appeals for the Fifth Circuit has grossly misapplied the law in its review of the record in this case. In support of this position the Petitioner has argued some of the evidence, cited a few Fifth Circuit decisions, without discussion, and brought to the attention of this Court unexplained statistics. It is respectfully submitted that

this vicious and gratuitous attack upon the integrity of the Federal Judiciary is completely unwarranted and ill-conceived. The evidence and the illogical inferences drawn therefrom by the Board were more than amply considered by the Court of Appeals as appears on the face of its decision. The Court of Appeals' evaluation of this evidence and these inferences in the light of the entire record is clearly set forth in its opinion. The attention of this Court is respectfully invited to the decision of the Court of Appeals in answer to the argument on the evidence. Respondents' argument of these facts to the Court of Appeals is reprinted as an Appendix to this Opposition to the Petition for Writ.

The reference to a few previous decisions of the Fifth Circuit in support of the charge that this is one of a long line of cases wherein that distinguished Court has "grossly misapplied" the law, is unjustifiable. In the last two years the Fifth Circuit has decided more than seventy cases involving the NLRB. It has enforced the Board's decisions in a great many of those cases. It has enforced numerous Board decisions involving discrimination as well as other types of unfair labor practices.

The statistics upon which the Petition relies are meaningless and misleading. So many factors such as consent decrees, volume of cases, types of cases, are unexplained that the statistics alone provide no basis whatsoever for drawing conclusions so serious as those proposed in the Petition for Writ.

The Court of Appeals for the Fifth Circuit is a distinguished arm of the Federal Judiciary system. The Court is made up of jurists of the highest integrity and competency. The completely unwarranted accusation that this Court of Appeals would and did "grossly" misapply the law implies willful and unconscionable action on the part

of that Court. There is nothing in the decision in this case or in the cases cited by the Petitioner which would justify such an accusation.

"Corrective action" such as the Petitioner seeks in this case can only be the beginning of an evolutionary process whose logical conclusion is the obliteration of the review powers of the Courts of Appeals and the shifting of undue authority to the Board in direct conflict with the express mandate of Congress as found in the National Labor Relations Act, as amended.

For the reasons stated hereinabove the Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals should be denied.

WILSON, BRANCH AND BARWICK,
By: ALEXANDER E. WILSON, JR.
By: ROBERT T. THOMPSON.

APPENDIX

APPENDIX.

The following is a reprint, with slight modifications, of a portion of the Respondents' argument on the facts to the Court of Appeals in this case.

The Layoff of January 31, 1958.

The Respondents in this case commenced business in the Summer of 1957. They were newly chartered corporations entering into the garment business for the first time in Loganville, Georgia. Respondent Walton Manufacturing Company, the principal corporation here, is in the business of manufacturing and selling men's dress suits. Respondent, Loganville Pants Company, was engaged in the manufacture of the pants for men's dress suits, with Walton Manufacturing Company as its sole customer. Loganville Pants Company ceased operations on or about January 31, 1958, and has not operated since that time (R. A. 109).

The record in this case shows that Respondents started their operations with completely inexperienced workers. The management of the companies was highly skilled and very experienced, having been in the field for many, many years (Tr. 1359-1360).[1] It was necessary for the Respondents to retain the green, inexperienced personnel who started to work in the Summer of 1957. Naturally,

1. Hereinafter the symbol (R.) is used to designate Volume I—Transcript of Record; the symbol (R. A.) is used to designate the Appendix to Respondents' Brief; the symbol (B. A.) is used to designate the Appendix to the Petitioner's Brief; the symbol (Tr.) is used to designate the original transcript before the Board where necessary.

inefficiency and low production were to be expected during this period of training. Likewise, it was necessary to employ more workers to meet production requirements in the early months than would be expected to do the same work as skills were acquired and efficiency increased.

The garment business is seasonal in nature and this results in fluctuations from time to time in the work force. Temporary seasonal lags may be bridged by reduced hours. More prolonged drops bring about layoffs (R. A. 193-195).

So it was that in the late Fall of 1957, a combination of increased efficiency in production and curtailed production requirements combined to make necessary a sizeable reduction in Respondents' work force. IT IS IMPORTANT TO NOTE HERE THAT THE NECESSITY OR THE LEGITIMACY OF THE LAYOFF ON JANUARY 31, 1958, IS NOT IN ISSUE (R. 113; Tr. 751). The only issue with regard to the layoff involves the question of which employees should have been laid off and which retained.

The Trial Examiner made a detailed analysis of each individual choice involving alleged discriminatees and determined that each and every choice was erroneous and discriminatory in nature. His "reasoning" during the course of this analysis is so inconsistent and illogical at times that it almost surpasses the imagination. For example, Respondents' witnesses testified that four factors were considered in determining which employees were to be laid off. With clock-like precision the Trial Examiner took those factors and whichever one did not fit in each particular case he used it as a reason for discrediting the Respondents' witnesses. If Respondents' witnesses' said seniority was a controlling factor, then the Trial Examiner would brush that fact aside and concentrate his fire on

some other factor. If on the other hand another employee under consideration had seniority in her favor and the Employer did not give that controlling consideration then that provided a basis for finding a violation. A few days seniority held great significance in one case but three weeks was of no consequence in another. If an employee had been reprimanded or warned that was inconsequential. Conversely, if the record did not show a reprimand then that was a controlling factor. If the Respondents offered a comparison which could not be overlooked or explained away (which with this Trial Examiner was a practical impossibility), then the important factor was that Respondents neglected to produce additional comparisons. On the other hand, in the case of one non-production employee the controlling factor in the Trial Examiner's mind was that Respondents failed to show a comparison with anyone else—although the record showed that her job was abolished. Obviously, the choice of employees for layoff must include some intangible, subjective considerations. Certainly, when the decision is participated in by two, three or more individuals they would not be expected to use the same descriptive terms to explain the choice. It would seem unreasonable to expect each one of them to be able to list each and every factor leading to each and every decision. Yet, in this case each time there was the slightest variation in terminology between witnesses it became a giant inconsistency. Each time one witness listed a reason for a choice which another witness might have overlooked it became a deliberate fabrication. Thus, we are told that one witness' testimony that one employee's quality was "a little better" than another's is inconsistent with another witness' testimony that the same employee had "a greater potential and was a better operator." (R. 132) If the Respondents' supervisors had told an employee

she was doing better or gave any word of encouragement then that was evidence that the employee was discriminated against in the layoff. If there was no evidence of words of friendly encouragement then the absence of reprimands was important.

In a case of this kind, with as many hundreds of pages of testimony as this, it is absolutely fantastic to believe that not one single witness for Respondents uttered one single word of truth, except where something was useful against Respondents. It is incomprehensible to find that every last issue of credibility was resolved in favor of the General Counsel's witnesses and aaginst the Respondents.

The Trial Examiner finds that sixteen employees were laid off on January 31, 1958. The record indicates that there were at least twenty laid off by Walton Manufacturing Company that day and at the same Loganville's entire operation was suspended (R. A. 109). The effect of the ruling which the Board seeks to enforce is to hold, without equivocation that not one single member of the organizing committee should have been laid off in a major cutback in the work force. Therein lies the faliacy in their whole case. They got so carried away with making an example of this Employer that they forgot about evidence, they forgot about logic, they apparently forgot about the review powers of this Honorable Court.

The burden of proof in this case lies with the General Counsel. It is up to him to prove that each one of these layoffs was discriminatory. An examination of the record as a whole indicates that the General Counsel completely failed to carry that burden. The Trial Examiner's analysis of the layoffs deals almost entirely with his attempt to tear down and discredit Respondents' case. Even if he had been able to do this, at which he so miserably failed,

the stark reality remains that the General Counsel's case consisted entirely of the fact that these people were named in the letter as members of a fictitious organizing committee. It is respectfully submitted that this does not prove discrimination according to legal requirements. Moreover, the substitution of the unexpert opinion of the Trial Examiner and the Board in lieu of the direct, expert testimony of the Respondents' witnesses, does not provide a basis for a finding of discrimination. The Trial Examiner has applied a test of absolute precision to the layoff decisions. Such decisions, involving the relative merits of people, can never be absolute. Obviously, there are no black and whites in such problems but merely shades of grey. The consideration is not whether an employee's quality of work was so unacceptable that she should be discharged, as the Trial Examiner seemed to require. The proper consideration is whether her quality is lower than an employee who is to be retained. A layoff calls for a completely different set of considerations from a discharge. This simple fact seemed to escape the Trial Examiner completely.

Layoff of Lela Beaver.

The layoff of Lela Beaver is a perfect example of the Trial Examiner's approach to this whole thing. Quite a number of employees at the Loganville Pants Company were laid off on January 31. The remainder of the work force was transferred to the Walton Manufacturing Company. Lela Beaver was one of those who was laid off. *She was the only one of a large group in the Loganville group laid off on January 31, whose name was mentioned in the Union's letter. She is the only one laid off on January 31, from Loganville Pants Company named in the Complaint. There is no other evidence in the record*

which would support a finding of discrimination in the case of this layoff. On the other hand, the Respondents have related the reasons Lela Beaver was not transferred to the Walton plant at the time of the layoff. As in the case of any layoff, questions can be raised, comparisons can be drawn. There is no evidence, however, which would even hint that the factors which were presented were not valid and did not provide the basis for the decision. The reason Lela Beaver was laid off was that in reducing the work force it was necessary to consolidate the operation which she was doing with another job. It was considered that Lela Beaver would be slow in learning the other operation, *slower than the other girl*, Alice Lowe, and therefore Alice Lowe was retained to do her work and Lela Beaver's.

The record here is unquestioned that Beaver was unusually slow in learning and therefore a girl who was faster in learning was put on the combined jobs. The Trial Examiner and the Board rejected this unchallenged explanation for Lela Beaver's layoff. The question is whether this Employer must retain an employee for a new job who is admittedly slower in learning than another girl who is available (R. A. 166-167, 204, B. A. 165).

It is significant to note here the Trial Examiner's analysis of this layoff. He rejected the testimony of Beaver's former supervisor, Atha, who had absolutely no interest in the outcome of the case since she was no longer employed by Walton (R. 117). He *assumed* that Beaver's continuous makeup pay was due to the unavailability of work when the only conceivable basis for the assumption was Beaver's testimony that Hughley had made an offhand remark to her that she could make production if they had the work. Beaver's testimony does not show an expression from her that this was the reason. This certainly doesn't prove the fact and even if it did it wouldn't

support the Trial Examiner's findings since the basis of the layoff was her inability to learn a new operation. Then the Trial Examiner attempted to take advantage of a letter which was written by Morris Scharff to Counsel for Respondents in which he indicated that he wasn't sure of the basis for the layoff but assumed it was for poor work. This letter was admitted over objection of Respondents and Respondents contend that it should have been rejected. However, a reasonable reading of the letter clearly shows that Scharff was writing from memory without the benefit of his records.

The Trial Examiner made a big point of how many operations Beaver was capable of doing. Here again he attempted to inject a basic factor—versatility—which did not figure into the layoff. Inability to learn a new job was the basis. But the record does not support his finding that Beaver performed two operations while the employee retained performed only one. Beaver's job was setting flies and turning corners. This obviously was one operation which most witnesses referred to as setting flies. Alice Lowe's job was sewing on belt loops. There is absolutely no evidence that one of these jobs is easier than the other and yet the Trial Examiner, who certainly revealed no expertise in the garment field, *assumed* that Beaver's job was more difficult. Here again he is injecting a factor, *based entirely upon assumptions*, which did not figure in the layoff. It is interesting to note that the Trial Examiner himself referred to Beaver's job as "the operation of setting flies and turning corners." (R. 116). In conclusion, the Trial Examiner said that Beaver was equal to Lowe in quality, production and versatility—none of which is supported by the record—and therefore seniority (approximately seven weeks) should prevail. Typical Labor Board fashion, a criterion is adopted and applied in robot fashion

and if everything doesn't fit then it's wrong. The Trial Examiner and the Board refused to see the reality of the situation. It is fine to attempt to follow criteria where possible. But, here there was another compelling factor which no one denied and the Respondents have a right to follow it. The record simply does not support the Board's finding as to Lela Beaver.

Layoff of Nellie Hood.

Nellie Hood was a floorgirl. She delivered materials to the various operators and did odd jobs. Her job was abolished as a result of the layoff and the work which she was doing was absorbed by various other employees who were regularly engaged in more productive operations. The supervisor even did a portion of it. This was a sort of luxury job which could be and now is being done by the other workers. This is a logical place for a cutback when the work force is being reduced (R. A. 37, 158, 179-180, 213-214; B. A. 53, 161-162, 200).

The record clearly shows no illegal conduct was committed by the Respondents with respect to this employee. The isolated statement of supervisor Carter had no threat in it and was admitted so by Nellie Hood (R. A. 75).

The Trial Examiner's findings regarding Nellie Hood are unbelievably fantastic. About all he has found to say is that we failed to come up with a comparison between her and some other employee and he discovered an inspector who had less seniority who should have been explained away. Hood was not a production employee. She matched up bundles of cloth and hand carried them to the machine operators. She has no production quota: in fact, she produced nothing. *She simply did a job which Respondents could do without in a cutback and so it was eliminated.* Her job was eliminated, therefore, she was

laid off. It was a position layoff. This seems simple enough but the Trial Examiner insists that it be justified on a seniority basis with someone doing an entirely different, unrelated job. The burden of proof is upon the General Counsel. It is respectfully submitted that there is no evidence in the record to support the Trial Examiner's and the Board's findings as to Nellie Hood.

Layoff of Frances Elizabeth Johnson.

There were five operators in the lining section, Frances Elizabeth Johnson, Mary Barnes, Annie Brooks, Imogene Meeks and Odele Barnes. Mary Lou Partain also spent part of her time in the lining section. At the time of the layoff, two of the operators in the lining section were eliminated, Mary Barnes and Frances Elizabeth Johnson. Frances Elizabeth Johnson had only been in the lining section for six weeks, and certainly in the cutback, she would be laid off before the others. The other girls were more skilled in the operation and more valuable to the company. The work which she had been doing was absorbed by Odele Barnes and Imogene Meeks. *Now Mary Barnes was also laid off, but, unfortunately for her, her name did not appear on the Union's threat letter.* This is not to say that Frances Elizabeth Johnson was an undesirable employee. Because of her limited experience and skill, she was simply less valuable than others in the section. Those are the people you eliminate when you cut your work force (R. A. 36-37, 146, 178-179, 213-214; B. A. 52-53, 150-152, 174-175, 179-180, 200).

The factors which were given weight by the Trial Examiner with respect to this employee were that she was given a raise a few weeks before her layoff and had been complimented by the plant superintendent (R. 135). The record clearly shows that Johnson was given the raise

when she was put on the new job in the lining section as an incentive to work hard and develop her talents. *She was on a training program at the time of the layoff.* She was the fifth employee in a five girl section.

The analysis of Johnson shows that the Trial Examiner here confused grounds for layoff with grounds for discharge. There is no inconsistency in the testimony. All the witnesses testified that Johnson's work was not satisfactory, her quantity and quality were below par. But, she was in training. However, when it came time to layoff it would be ridiculous to retain a trainee and lay off an experienced operator. Nothing said by the Trial Examiner or the Board in any way overcomes the fact that Johnson was the obvious choice for layoff in the section where she worked.

Layoff of Ida Harper.

Ida Harper was hired in July, 1957, and performed the job duties of hemming the lining of the coat (B. A. 94-95). *Harper admitted having a substantial amount of repair work* (R. A. 58-59); *trouble with the machine she operated* (R. A. 59), *and makeup pay every week she worked for the Respondents* (R. A. 59-60), *which resulted from her not making production as required* (R. A. 60).

Harper further admits that no supervisor or anyone else connected with management ever spoke to her about unions (R. A. 61-62). In addition to the above, *Ida Harper admitted talking and laughing and generally staying away from her work* (R. A. 62; B. A. 102), *and being absent a great deal* (R. A. 64, 113-114; B. A. 143-144).

Ida Harper was laid off January 31, 1959 (B. A. 99-100). The record is clear that this alleged employee was laid off for being an unsatisfactory operator, for general

"horseplay" and because her job was only part time (B. A. 172, 141, 173; R. A. 212-213, 112-113).

The record contains no evidence of discrimination toward Ida Harper or of a discriminatory motive in her layoff.

The Trial Examiner's analysis of Ida Harper's layoff almost reaches the frenzy stage. He finds that Prosterman's testimony that she could not produce properly and that her makeup record was bad is inconsistent with Scharff's testimony that her work was unsatisfactory as to quality and quantity and both are inconsistent with Ewing's testimony that she was terminated for bad work. A great point was made of Ewing classifying Harper's termination as a discharge instead of a layoff—certainly a distinction which would not hold great significance outside legal circles. It almost gave the Trial Examiner apoplexy when she did explain that she didn't know whether the termination was classified a discharge or a layoff. Here again the Trial Examiner applied the test for a discharge in a layoff situation. He has twisted evidence, taken testimony out of context, added assumption and conjecture, and thrown out testimony as unbelievable where it interfered with his objectives. In effect the Trial Examiner, here as in the other layoff cases, has substituted his own judgment for that of Respondents' management personnel, who had years of experience in this field.

Layoff of Nellie Wood.

Nellie Wood was hired August 5, 1957, to perform the duties of edge basting and taping fronts (B. A. 103). This employee admits she did not have a regular job (Tr. 470) and that she handled overflow (R. A. 66). This employee testified she signed a Union card and attended Union meetings (B. A. 105), and that she received a ten cent

wage increase after she had complained about being switched around and had refused to run a machine (Tr. 479). This witness further admits requesting a transfer to the pants plant, because *there wasn't enough work at the coat factory* (R. A. 66). Wood also testified Morris Scharff stated to the employees that he had no intention of closing the plant (R. A. 66). It is to be pointed out that this General Counsel witness admitted that the Union people told her that if she signed the paper authorizing the use of her name in the Union letter, she couldn't be fired (R. A. 67). This is obvious proof of the Union scheme to gain preferential treatment for its adherents in the Respondents' operations. The bias and prejudice of the Trial Examiner is illustrated by his gratuitous addition to her testimony of the statement that the Union assurance was "presumably for her Union activity." (B. A. 18). If that had been true it would certainly seem that someone would have seen fit to put it in the form of evidence.

The case of Nellie Wood is one of the more ridiculous ones. She was a second stringer who helped one operator or another when there was an overflow of work. Obviously if she had been better than they, common sense would dictate that she be put on one of the jobs. *But the record is absolutely unquestioned that her work did not measure up to that of the other operators.* The Trial Examiner in his zeal completely misstated the evidence on this point. He said Prosterman testified that Wood *could* do the work as well as the other operators (R. 122). Actually Prosterman's testimony shows that under extensive cross-examination by the Trial Examiner he repeatedly said that Wood's work was inferior and finally speculated that she *might* have approached them if put on one of the jobs (B. A. 188-189). But still the fact remains that she wasn't then doing as well. Here again there is a misconstruction of

the facts. Scharff testified that Wood's work was below par but not sufficiently so as to bring about her termination. In other words, you wouldn't fire her for it—but in a layoff it is a controlling factor. *The fact also remains that the other two employees had seniority over Wood.* After making so much "to do" over seniority in the other cases it is breathtaking to find it brushed aside here. The logic of the entire Intermediate Report and Board decision is laid bare here. The Trial Examiner was so blindly determined to find against these Respondents that he absolutely became irrational. In the case of Nellie Wood he is suggesting that less competent employee with less seniority be retained over more competent, senior employees. The melodramatic reference to Mrs. Wood's demeanor on the stand brings to the surface the uncontrolled emotionalism which underlies the entire Intermediate Report. It might just as easily be said that Mrs. Wood was upset because of being forced to testify against her sincere wishes or she might just have been frightened by the Trial Examiner and his rapid-fire verbal exchanges with counsel and witnesses.

The record does not support the findings as to Nellie Wood. It is obvious that she herself does not consider that she was discriminated against.

Layoff of Evelyn Hudson.

Evelyn Hudson was employed in the sleevemaking section performing an operation known as sleeve tacking. Also in that section were employees Regina Hall who was making the seam and vent; Grace Barnes, who sewed the sleeve and the lining together and Bonnie Thompson, who closed the end seams. *The job which Evelyn Hudson was doing was the most mechanical (requiring the least skill) in this section, and the other operators had more ability and were performing more complicated work.* (R.

A. 175-176). It was therefore determined that Evelyn Hudson should be the one eliminated from that section, her job abolished and the work performed by the other operators along with their own (R. A. 37, 146-147; B. A. 54-55, 175, 176, 201).

The Trial Examiner put great weight upon the testimony of this Evelyn Hudson. Yet, an examination of the record shows that her testimony was contradictory, inconsistent and vague. She did not have a good memory (B. A. 130), and yet she vividly quoted remarks allegedly made to her by Morris Scharff concerning the Union letter (B. A. 131). Later on she admitted that she didn't recall the exact words used (R. A. 96). This witness testified that she could not do the job of fellow employee Regina Hall (R. A. 94), and admits that before and after being recalled, she could not perform the duties of making sleeves (R. A. 94-95, 97). Hudson also admitted that she failed to make production for her former employer and that she was fired for this reason (R. A. 96-97). The evidence further reveals this employee had considerable makeup pay (R. A. 98) and after being recalled was discharged on August 18, 1958, because she was unable to perform the duties assigned to her.

The Trial Examiner in his analysis of Evelyn Hudson's layoff again fell back on the standard Labor Board doctrinaire approach. He decided that seniority and versatility favored Hudson over the other employees who were retained. He discredited unchallenged testimony that her work was not on a par with that of the others and that she was less skilled. In other words he applied the criteria and finding one to suit his purpose he used it as the basis of his finding of discrimination. He is in effect insisting that every consideration employed in each case be likewise applied to all other cases. The law is not

that prohibitive. A realistic analysis of the rigid, austere standards applied by the Trial Examiner reveals them to be unbelievably harsh and unfair. Decisions involving the choice of one individual over another simply cannot be made to fit into a rigid formula (mathematical or otherwise). Respondents have repeatedly attempted to point out this fact but neither the Trial Examiner nor the Board even considered it. They simply tore into the Respondents' explanations with a vengeance and a vigor which only the most ardent advocate could duplicate. The resulting decisions reflect for all to see the dangers of the administrative proceeding. One man, the Trial Examiner, got it into his head that these Respondents had violated the Act and from that point on it was not a matter of judicial determination through the processes of reasoning and logic. From that point on it was a question of how he could best tear down, explain away, discredit, destroy, belittle, twist, misconstrue and avoid Respondents' testimony and arguments. But, when it is all over the General Counsel has still failed to carry the burden of proof and there is no substantial evidence in the record to support the Board's decision.

Layoff of Bonnie Hamilton.

Bonnie Hamilton set welts. She was laid off on January 31. Mrs. Hamilton and another Lucille Yancey both performed the same operation. Under the cut-back in production it was only necessary to have one operator on this job, and Lucille Yancey was considered a better employee. This is not to say that Bonnie Hamilton was an unsatisfactory employee. Certainly, no issue has been raised by the Respondents in this respect. But, that doesn't throw light upon the layoff since Lucille Yancey was not an unsatisfactory employee either. In the case of a layoff

unfortunately, employees who have proven themselves satisfactory must be laid off because there are not enough jobs to go around. The question in this instance, as in all instances, was which employees would be more valuable to the company under a cutback in operations. It was determined that Lucille Yancy was more valuable and therefore she was retained and Bonnie Hamilton was laid off. There is nothing in the record to challenge the wisdom of this decision. Even if there were there is nothing to support a finding of discrimination (T. A. 158, 174-175; B. A. 159-160, 43-44).

The Trial Examiner really had to stretch to make a finding of discrimination in the layoff of Bonnie Hamilton. In this case she and the other Yancey both performed the same job. Yancey's production record is substantially better than Hamilton's. Even a person who knows nothing about the garment industry would readily see the wisdom of this choice. About all the Examiner has really said is that he doesn't want to believe it. He points to an "inconsistency" which arises by one witness saying under oath that Yancey's work was a "little better" and another saying in a letter to his counsel that it was "much better." Then he says that a third witness' characterization of Yancey as having "greater *potential*" is inconsistent with both of the foregoing. On top of that he credits and relies upon the testimony of an unskilled unqualified floor worker (over the directly opposite testimony of at least three experts) to the effect that Yancey's work was not superior to Hamilton's. Then he adds as additional controlling factors that Respondent failed to compare Hamilton with other employees, without naming those others or giving reason for such a comparison, and of course the fact that Hamilton had a "few days" seniority over Yancey was a matter of utmost importance in convincing the Examiner

that the discharge was discriminatory. It is respectfully submitted that not one single point relied upon by the Examiner to find discrimination against Hamilton was valid and there is absolutely no evidence to support same.

Layoff of Pauline McGhee.

Pauline McGhee was also laid off on January 31. An employee by the name of Charlotte Findley was retained in preference to Pauline McGhee because it was considered that she had a greater potential and would thus be a more valuable employee. Pauline McGhee was basting bottom seams. Charlotte Findley was basting bottom lining. These jobs were very similar in nature and under the cutback in operations only one operator was required to do both jobs (R. A. 33, 175, 185, 211-12; B. A. 44-45, 169-171; Tr. 294-298).

The Trial Examiner found this layoff to be discriminatory for several interesting reasons. First he acknowledges that Charlotte Findley had more seniority than Pauline McGhee (although he is quick to point out that it is only a matter of three weeks). Where seniority was an important factor when it favored the employee laid off, and where three weeks was a significant period in one case and even a "few days" was considered important, now seniority not only is unimportant but he refuses to believe that this was the reason for the layoff. Then he refuses, without any supporting evidence to contradict the expert testimony, that Charlotte Findley had more potential or would prove to be a more valuable employee than McGhee. The Examiner deliberately misinterpreted the testimony of Prosterman that Findley earned more money than McGhee. An examination of the record clearly reveals that in the garment trade one employee "earns more money" when she produces more pieces per hour. Earn-

ings per hour are always the important factor in a piece rate operation such as this. The gross pay argument advanced by the Trial Examiner is merely a subterfuge. Even so, it is misleading even if gross pay were the proper test. The difference in the hours worked and particularly in the overtime and makeup pay are matters which cannot be overlooked.

The records show that Findley had less makeup pay (which is the difference between that earned and the legal minimum of $1.00 per hour) than McGhee throughout the entire history of their employment. The record also shows that Findley had no more makeup after the first week in December, 1957, while McGhee continued to have makeup for at least an additional month.

Finally the Examiner stated his real, and only, reason for finding that Pauline McGhee was discriminately laid off when he relied upon his "general lack of faith in the credibility of Prosterman, Myrtle Ewing and Morris Scharff" (R. 149). It is respectfully submitted that there is no evidence in the record upon which a finding of discrimination may be made as to Pauline McGhee.

Layoff of Violet Ewing.

Violet Ewing made welts. She was terminated on January 31, as a part of the cutback in production. Violet Ewing and Margaret Britt did similar work. In addition to their other work they shared the sewing of facings, a mechanical operation. The job which Margaret Britt performed was more complicated than the one performed by Violet Ewing. The decision was therefore made to retain Margaret Britt and have her do Violet Ewing's work along with her own rather than the reverse (R. A. 158, 174-175, 210; B. A. 199, 159-160, 43-44).

The Trial Examiner's analysis of Violet Ewing's layoff consists of a listing of several things which Respondent didn't do. For example, Respondent *didn't* reprimand Ewing for her unsatisfactory work. (This was not a discharge for cause but a layoff.) Respondent *didn't* compare Ewing with an employee named Madeline or explain why the two were not compared—although there is nothing in the record to indicate why they should be compared. The Trial Examiner just assumed that there should be such a comparison. Respondent did recall Ewing in October of 1958, and Prosterman is reported to have stated to Supervisor Higgins that she was a good worker. (*Again* she was not discharged for cause but laid off in preference to another employee.) The only other factor alluded to by the Examiner was seniority which again becomes important because it favors the alleged discriminatee. Those considerations—failure to reprimand and failure to compare with an employee whose full name is not even known plus commendatory remarks upon reinstatement and of course seniority—are the basis for the Examiner's refusal to accept Respondents' explanation for Violet Ewing's layoff. It is respectfully submitted that there is absolutely no validity to the Examiner's analysis and that each and every premise upon which it is based is false and meaningless.

* * *

The Trial Examiner stated his general conclusions regarding the layoffs (R. 151-154). An examination of these conclusions reveals that they are nothing more than a reiteration of his other findings. In effect he says that since he found other violations of the Act based upon other testimony (most of which is discussed at other places herein), then he finds the layoffs to be violations. It is extremely difficult to follow this logic. The record as a

whole does not support it. It is significant therefore that the Examiner found it necessary to turn to Mr. Uspensky's work on mathematical probability in order to support his conclusions. The Board tried to help him by throwing in a few more findings of violations of Section 8 (a)(1). But when it all boils down the one glaring defect in their case is that they decided it upon *mathematical probability, whim*, suspicion, conjecture, false assumption and pure and simple guess work.

Discharge of Lucille Yancey.

The case of Mrs. Lucille Yancey presents a perfect example of the Trial Examiner's predisposition to credit the Petitioner's witnesses while summarily dismissing Respondents' evidence. Regardless of the thoroughness with which it was presented or the reliability of the witnesses who testified.

Mrs. Yancey was discharged by Respondents on or about December 4, 1957. The reasons for the discharge were that Mrs. Yancey's work was poor, her attitude was generally bad and she was uncooperative. In spite of warnings about her sloppy work, make-up increased and her performance became increasingly poorer the longer she worked for Respondents, culminating in six straight weeks of make-up pay (G.C. Exhibit 29; R. 211).

Respondents produced six witnesses who verified that Yancey's performance justified her discharge. All were intimately familiar with Yancey's performance and represented not only supervisory staff (Scharff, Prosterman and Higgins), but also her fellow workers (Odele Barnes, Imogene Meeks and Ruby Berry), all of whom concurred in the testimony that Mrs. Yancey's work was unsatisfactory. The testimony of all the supervisors who acted

as overseers for Yancey, who were called and subjected to cross-examination, are consistent in their testimony that Yancey had been terminated for good and valid reasons. All witnesses agreed that Yancey's work was poor and full of mistakes. The evidence showed that she used the wrong color thread (R. 85), that she sewed the wrong facing on the wrong lining and that the darts were sewn on the wrong side of the lining (R. 89). In short the quality of her work was shoddy (R. 85-91).

It was further shown, however, that the defective work and production were not the only place where Yancey proved to be a poor employee. The evidence also indicated that in addition to being "incompetent", "undesirable" and "unsatisfactory", she also "grumbled", "complained" and was generally uncooperative and unruly (R. 87-88). Besides complaining about the cut of the coat which she admittedly had difficulty sewing (R. 91), she is quoted to have said off-handedly to her supervisor, "Now, listen you are going to have to make it a little easier on us around here." (R. 188).

The record further shows that Lucille Yancey signed a union authorization card (B. A. 60), but took no active part in organizing fellow employees (R. A. 46-47). This witness admits that no supervisor mentioned or discussed the Union with her (R. A. 46). It is further clear that Lucille Yancey was discharged on December 4, 1957 (B. A. 61, 168), before a single Union meeting had occurred (R. A. 46). The evidence reveals that Lucille Yancey was discharged for cause (R. A. 136-142, 151-152, 161, 186). Even after her discharge this witness admits that the Respondents did not know of her union activity (B. A. 65).

Yet the Trial Examiner in the Intermediate Report states:

"I am satisfied that Mrs. Yancey was discharged on December 4, 1957, because of her activity on behalf of the Union." (R. 98).

It is submitted that this employee had no Union activity other than signing a card, that there is absolutely not one iota of company knowledge of any such activity on the part of this employee, direct, indirect, imputed or otherwise. Scharff's testimony verifies this statement (R. A. 206).

Based on the facts of the record, it is submitted that the General Counsel has not carried the burden of proof and that the findings of the Trial Examiner with respect to this alleged 8(a)(3) violation are completely erroneous and unjustified by the record.

Two further points illustrate the fact that the Employer is understandably exasperated and completely nonplussed by the Trial Examiner's report and that Mrs. Yancey's testimony on its face indicated that she was not a credible witness. First, is the fact that Yancey (whose testimony was fully credited while Meeks' testimony was partly credited and partly discredited) (R. 90, N. 26, R. 94), testified that during the entire five months she had worked for Respondent she had *never* been given any instruction on how to do her work (R. 91). This statement is unbelievable. She had worked for over five months, had been admonished every day and had made Higgins weep, but she had *never* been instructed in her job! Further, she denied arguments with Higgins and other employees and said all her discussions were "routine"—(routine discussions but no instructions)—and all her discussions with Higgins were on a friendly basis. Respondents suggest that Mrs. Yancey's term "discussions", which she admits having, is a euphemism for reprimands and instruction. In addition to Yancey's claim that she was never

instructed on how to do her job, a statement made in the face of the admission that she had never sewn lining before, is the assertion that she never ripped out a single lining (R. A. 44). This is and of itself would lead one to doubt her veracity in view of the testimony of five other witnesses. This doubt is confirmed without question a moment later, however, when she says she did not rip out linings and that she sewed a completely "proper garment." (R. 45).

The other points regarding the tendency of the Trial Examiner to prejudge an employer and to arbitrarily give credit to one witness' testimony over the other without any reason is best illustrated by quoting one sentence from his opinion

> "The only testimony regarding Yancey's alleged failure to distribute fullness properly was that of Prosterman and Higgins, whom I generally discredit, and moreover even if it occurred which I doubt, I am not persuaded that it was due to any lack of ability on the part of Mrs. Yancey but rather to the *skimpy* cut of the lining which she admittedly and frequently called to the attention of her supervisor." (Emphasis supplied)

Certainly we had administrative expertise here, the Trial Examiner, unknown to anybody in the hearing, claims to know how to manufacture clothing. Yet he never examined the goods, never mentioned that he knew anything about the clothing business and never held Yancey up as an expert. This conclusion is unjustifiable.

These facts together with the clear indication that the Trial Examiner's predisposition in this matter supports the Employer's contention that his finding regarding the creditability of witnesses are not supported by the evidence and are ill founded.

General Counsel, in his brief, and the Trial Examiner, in his opinion, expound the virtues of Mrs. Yancey by showing that Mrs. Yancey had some past experience and that she had never been criticized for her work. Respondents' position on all such assertions by the General Counsel and on all the employees alleged to have been discriminated against, is that the experience asserted in favor of many of these people means nothing for the following reasons. First, some experience can be worthless or actually detrimental, especially in this type of operation since the product was a finished quality men's coat. The sloppy and hurried methods used in the manufacture of cotton pants would hardly be transferable to those required in this plant where less workable cloths are used. Mrs. Yancey's experience was in a work clothes' plant at "Carwood". The Trial Examiner made no distinction between these two type operations. None of these factors can be meaningful out of a comparison with all other employees in the plant —their experience may be important—more important, however, is the kind of experience they had. Other factors, such as quality of work produced, and their attitude, were given greater weight by Respondents.

Items such as make-up pay, work to be redone and Respondents' push for more production were a substitute for outright criticism. It would be hard to believe that they did not know when they were doing a substandard job. Besides this fact, another point which General Counsel attempts to make is the fact that supervisors Prosterman and Morris Scharff's reasons for layoff were not consistent. Prosterman said that there was not enough work for her (R. 84; B. A. 62) while Scharff told her that her work was "unsatisfactory" (R. 84; B. A. 63). The Employer asserts that in the existing situation where a cutback was concededly necessary that Petitioner is attempt-

ing to force a distinction here where there is none. Both witnesses were saying in effect that Mrs. Yancey's work was substandard and under present conditons she could not be retained. The problem was that Prosterman was given the job of firing her and he tried to do so as diplomatically as possible. Insofar as Lucille Yancey's statements regarding her *belief* that she had been terminated because of her Union membership, we point out to the Court that they were specifically denied by Morris Scharff (Tr. 86). In such a case the direct evidence should certainly prevail over the conjecture of an interested party. The Trial Examiner credited the conjecture without apology. Noteworthy, also, is the fact that contrary to General Counsel's statement that the records did not show poor work or that the production was unsatisfactory, the payroll records (B. A. 211, G.C.'s Exhibit 29) prove that Mrs. Yancey had six weeks of straight time, eight weeks in which she made production and eight weeks in which she did not make production. Six of these weeks in which she failed to make production occurred just before she was terminated. At this time she had had six months training in Respondents' plant in addition to her other six years vast experience with Carwood. Later, when Yancey had a change of heart, General Counsel admitted the fact that Morris Scharff refused her offer to defect and become a turncoat against the Union (R. A. 206). Scharff was presented with a real opportunity here to do irreparable harm to the Union's organizational drive. It is to Scharff's credit, however, that he decided to forego this opportunity which would have been irresistible to a person dedicated to anti-unionism and very tempting to the average employer.

The incongruity and hollow ring of this case arises in the presumption indulged in by the Trial Examiner that all the Employer's acts were a mere pretext for his ven-

geance against the Union. These actions, however, cannot be fitted into the neat pattern which General Counsel has laid out in his alleged proof.

If the evidence of this case is fairly read, the General Counsel has not made out his case. There is no evidence that the Employer knew of Yancey's Union leanings (R. A. 206, 46-47). She was not a member of the Union when she was fired. A short time after Prosterman became head of this operation she was fired—there was no delay. The Company acted decisively when they felt justified in making a definite judgment on this employee.

Discharge of Grace McCart.

In the case of Grace McCart, who was discharged on January 10, 1958, the Court is again provided with direct and disinterested testimony to overcome the false assumptions, implications and innuendos which are relied on by General Counsel and the Trial Examiner in this case. The Employer submits that the testimony of Mr. Scharff, Mr. Prosterman and Mrs. Ewing, supervisors, and Sara Sanders and Charlotte Towler (disinterested employees of the Company) will dispel any doubt as to the incompetency of Grace McCart. McCart was discharged because of bad work (R. A. 29-31, 112, 120-124, 200-201, 215). She was admonished about the substandard quality of her work on numerous occasions (R. A. 112). In addition to McCart's difficulty with the thread, colors, machine and declining production, McCart also had difficulty with her supervisor, Myrtle Ewing, "on many occasions". (R. 98-100; R. A. 50). The aggregation of these "difficulties" led to McCart's discharge.

The Trial Examiner throughout the hearing required a high degree of explicitness of all Respondents' witnesses

He completely discounts, for instance, the testimony of two of Respondents' inspectors, who said that they found places where the thread skipped on collars and coats sewn by Mrs. McCart, because it was too vague. Yet, the Trial Examiner blandly offers the production records of October 11, *1958* (R. 101), a year *after* McCart's discharge, as definitive evidence that Prosterman's testimony regarding her poor production was inconsistent. Respondents are obliged to point out that what ever production rate McCart may have been able to achieve more than a year *after* her discharge and after she started to work again, is not relevant evidence to the period in question, *viz.*, around October, *1957*.

On another occasion General Counsel tried to establish the point that the reasons for McCart's discharge were (1) the malfunction of her sewing machine (which happened to be new), and (2) McCart's Union activities. If we are allowed the same presumption as the Trial Examiner indulged in, the Employer respectfully submits that no self-respecting businessman, Scharff included, who wanted to stay in business, would permit the malfunction of a small item such as a sewing machine which eliminates the effectiveness of an employee's work. Her wages would more than pay for a new machine in a very short time. The testimony shows and the Trial Examiner admitted (R. 98) that the machine was new and that the plant mechanic repeatedly fixed the machine and was continually checking it. It seems reasonable then to assert that the real reason for McCart's failure to make production was not the machine but her own inability to master the operation. McCart alleged the machine wouldn't do as good work on gaberdine material as on other materials (R. A. 50; B. A. 83-84). General Counsel's witnesses, Hester McCart and Mary Alice McWaters, however, testified gaberdine did not

give any more trouble than any other material (Tr. 514) and that the "Lewis Blind Stitching Machine" worked satisfactorily (B. A. 110). This leaves but one conclusion; any failure of the machine to operate properly was the fault of the operator. McCart also testified that she had another machine at her disposal if her machine happened to malfunction (Tr. 400). The Trial Examiner blithely overlooked this fact when he attributed so many of McCart's shortcomings to the equipment with which she worked (R. 102).

Insofar as McCart's Union activity is concerned, Morris Scharff testified that at the time Grace McCart was discharged he did not know whether she belonged to a Union or not (R. A. 201, 221). This testimony is again indicative of the fact that the sole reason for McCart's discharge was not her Union activity but her continual incompetency as an operator. The record reveals this employee had make-up pay (Tr. 391), was poor as a sewer (Tr. 887), produced bad work (R. A. 116, 120-122; B. A 84-86, 140, 144) and was corrected regularly about her work (Tr. 888). She was discharged on January 9 or 10, 1958, by both her supervisors and told that her work was unsatisfactory for so long that they had to let her go (B. A. 84; Tr. 907). The only reason she had not been discharged before, according to the supervisor, was that supervisor Prosterman had no one else available in the factory to use the Lewis Felling machine (R. A. 178).

Mrs. McCart, in her testimony related a conversation which she had with Morris Scharff *after* her discharge. General Counsel, in making much of this conversation, does not emphasize or even mention the fact that Morris Scharff, when presented with her accusation that she was fired because of Union activities, denied this fact and promptly ex-

plained to her that the real reason for her discharge was her unsatisfactory work. Neither is the fact mentioned that it was McCart, not Scharff, who first introduced the subject of Union into the conversation. On her inquiry, Scharff, who was evidently surprised by this accusation since he knew nothing of her union activity, then felt free to discuss the matter with this discharged employee. Respondents fail to see how this conversation, initiated by Mrs. McCart and in which the Union was discussed, shows any animus on Respondents' part, particularly in view of the fact that he specifically denied the fact that Union membership had anything to do with her discharge at the outset of the interview.

It is important that Counsel for the General Counsel never established that this employee had signed for the Union or engaged in any Union activity. Thus, the Trial Examiner has, in a conversation occurring *after* her discharge between the alleged discriminatee and Morris Scharff, found that the Respondents discriminated in respect to the hire and tenure of employment of Grace McCart (R. 102).

Outside of this conversation with Scharff, Mrs. McCart admits in her testimony that she had never been interrogated regarding her Union activity by any member of management in the plant (R. A. 51).

The *facts* as shown by the testimony indicate that Mrs. McCart was an incompetent employee. The testimony of numerous witnesses verifies this fact. She had trouble with Myrtle Ewing and the machine, in spite of the fact that the machine was brand new and she had another one available (R. A. 51). After her discharge she had a conversation with Morris Scharff in which she interjected the subject of union in the conversation, and after Scharff de-

nied he had discharged her because of her Union activity, a short discussion on unions resulted in the natural course of events. Respondents respectfully aver that the paucity of evidence is insufficient to sustain General Counsel's contentions of discriminatory discharge.

Discharge of Pearl Coker.

Mrs. Pearl Coker was discharged because she could not produce a sufficient quantity of work and because her operation was absorbed by three other employees, Mary Lou Partain, Hester McCart and later Louise Sammons. Mary Lou Partain, a Union advocate whose name had appeared on the letter sent to the Employer by the Union, as a member of the organizing committee, was retained over Mrs. Coker.

These circumstances prove that Respondents' predicament was a hopeless one. Unless Respondents laid off Hester Lou McCart, a concededly superior worker, they were placed in the unhappy situation of choosing between two Union employees for the layoff. As later developments proved, there was no possible way to win in such a situation—allegations of discrimination waited for them either way they turned. Higgins testified that the section was too "strong"—meaning they had too many employees on this operation. Thus, one operator had to be laid off. Since there had to be a layoff, Pearl Coker was chosen because she was a slow operator and she apparently could not make production (R. A. 143; B. A. 149-150). Neither could she set a collar properly nor adjust its fullness correctly. Frequently, Coker's work had to be redone (R. A. 143). Although Partain's work left much to be desired and she was admittedly slow in this operation, it was decided that because of her ability to perform additional operations she would be retained. Coker made no pretense

of being versatile and at that particular time a versatile operator was needed until Louise Sammons could return to work (R. A. 217-218). Partain was then soon moved to utility girl where she properly belonged. Thus Partain was Pearl Coker's temporary replacement until Sammons could come back for the Spring season, from a leave of absence (R. A. 84). Partain was kept on in order to maintain some degree of flexibility in the operation.

Pearl Coker was rehired some eight months later to fill in a gap in production. The reasons for the rehiring were that Mary Lou Partain had quit in the interim (R. A. 145) and Mrs. Coker would not need retraining. Further, the quantity of garments needed was higher than it was in January, 1958. Coker, it was judged, could supply just about the amount of production needed to balance the section's production with the rest of the shop. A faster operator would have produced too many collars and created an imbalance. This explains the hiatus period to which the Trial Examiner referred (R. 106, fn. 38).

Contrary to the General Counsel's glowing opinion of Mrs. Coker and the statement that her work was never criticized, Mrs. Coker's testimony admits that she continually had make-up pay, even up to the time she was fired on January 15, 1958 (R. A. 47-48). Certainly, this is a form of criticism and considering she was apprised of the fact, it is difficult to see how one can assert that she was not criticized. Mrs. Coker testified on cross-examination that she did not actively work for the Union and never signed anyone up for or attempted to sign up anyone for the Union (Tr. 357). General Counsel points to the fact that on January 10, 1958, Pearl Coker told her supervisor, Grace Higgins, that she had attended a Union meeting the previous evening and that shortly after making this statement she was discharged. This

coincidence was apparently enough for the Trial Examiner to find that there had been a discriminatory discharge. In order to justify his position the Trial Examiner referred to a conversation which was supposed to have taken place between Mrs. Higgins and Mrs. Coker in which Higgins was alleged to have said that Morris Scharff had informed them in a supervisors' meeting that he would close down the plant before they would allow Union labor in the plant. What was not referred to in this conversation, however, was the fact that there was at least one other employee present at this conversation. Not only was she not mentioned, but she was not called upon to corroborate this hearsay testimony. Hester Lou McCart was present and overheard the entire conversation (R. 106).

Strangely enough, however, McCart did not hear Higgins give the account of the supervisors' meeting (R. 106, Tr. 598). Higgins likewise did not remember giving the account of the supervisors' meeting where this statement was alleged to have been made (R. A. 148). It would be difficult to believe that such a statement was made in view of the other circumstances in the case. Certainly, if it had been made Hester Lou McCart, another employee who was present, would have heard it, and certainly would have been much more impressed with that than with the original remark by Pearl Coker about attending a Union meeting. Presumably, this testimony was offered for two purposes, one, to get in the alleged threat by Grace Higgins and the other to prove that the Company knew Pearl Coker had been to a Union meeting about the time she was fired. This was January 15, six weeks or so after the Union campaign had started. It does not seem logical that the Company would at this time fire an employee who had simply attended a Union meeting and who

came to her supervisor and advised her of the fact. She did not say that she had joined the Union or believed in the Union, she simply stated that she had been to a meeting, and that is the General Counsel's case with regard to Pearl Coker. The facts show that Pearl Coker was discharged for reasons entirely apart from her attendance at a Union meeting. In the first place, Pearl Coker was unable to produce the quantity that was needed on her job. A comparison between her production (G. C. 37) and that of Hester Lou McCart (G. C. 38) illustrates this point better than words. The same point is illustrated in comparing Coker's record with that of Louise Sammons (Respondents' Exh. 43). The record is unquestioned that more production was required from the particular job that Pearl Coker was doing. Another operator who had previously been employed and was known to the management to be competent and more efficient than Mrs. Coker was available. Three operators were not needed on the job if you had two good ones. Hester Lou McCart and Louise Sammons were both better operators, as the records show, than Pearl Coker, and for that reason, and that reason alone, Pearl Coker was discharged and Louise Sammons was put in her place. Mr. Prosterman summed up the circumstances surrounding Pearl Coker's discharge in the following words: "I had two operators available who were capable of turning out production and earning a great deal more and I thought Pearl Coker was surplus." (B. A. 42; Tr. 238). This is also supported by the uncontested evidence (B. A. 148-150, 198-199; R. A. 143-145, 208; Tr. 1024-1028, 1444-1445).

The evidence clearly shows that the General Counsel has not carried the burden of proof in proving company knowledge of Pearl Coker's Union activity. The Trial Examiner in finding Pearl Coker to be an alleged 8(a)(3)

has based his findings on a statement made by Morris Scharff wherein it is admitted he stated that it was common knowledge in the community that Coker was for the Union (R. A. 201; B. A. 196). The record does not support a finding that the Respondents were aware of Coker's activities at the time of her discharge. However, granting *arguendo* this is true, there is nothing in the record to show discrimination in respect to this alleged 8(a)(3) violation. It is therefore submitted that the evidence clearly reveals that this employee was discharged for just cause and that the Trial Examiner's findings with respect to Pearl Coker are not supported by the record.

Based on the facts presented in the record, Respondents submit that a thorough reading of this testimony, stripped of any facts supplied from outside the record, will yield no other conclusion except that this employee was justifiably discharged.

Discharge of Ruth Brooks.

Ruth Brooks was discharged from the pants plant on January 16, 1958, by Mr. Hughley (R. 109). Mrs. Brooks admitted that she did not make production and that she had difficulty doing the work. The conceded facts are that layoff was necessary and that the work force was to be severely cut from approximately thirty-eight operators to twenty-two operators (R. 102, 113). Any vague accusation as to discrimination in the discharge pales under the weight of this evidence. There can be no dispute, contrary to the Trial Examiner's assertion (R. 111, n. 40) that there was not a reduction in the work force since in three months time the employee complement dropped from forty-three to twenty-six employees and ultimately to nineteen (Respondents' Exch. 7).

General Counsel apparently, having developed an affinity for the mock epic style in writing this brief, has begun every discussion of each discriminatee by extolling their experience, the quality of their work, the fact that they have *never* been criticized because of their work, etc., *ad infinitum*. They have been presented in grand style. The true facts concerning this employee furnish another example of why the alleged virtues of this employee are not founded upon real evidence. The allegations by the General Counsel and Trial Examiner that Ruth Brooks had had a great deal of qualifying experience, had *never* been criticized in her job and was a "good" operator are gross misstatements of fact. Specifically, the uncontradicted evidence shows that (1) in spite of Ruth Brooks' experience she was a poor employee and by her own admission had an abnormal amount of make-up (R. A. 81). (2) that the statement by General Counsel and the Trial Examiner that Ruth Brooks was *never* criticized is a misstatement of fact is made explicit by the testimony which indicates that Ruth Brooks was fully apprised of her inadequate performance, was distressed about it, and was criticized directly and forcefully. The following specific testimony illustrates that fact:

> "Q. Did you have difficulty doing the work that you were doing down there?
>
> A. At times.
>
> * * *
>
> A. I told her about the different places that I had worked before and that I had always made production everywhere I worked until I came here. And there was something wrong somewhere why I couldn't make it.
>
> * * *

A. I went in to see him one morning and he was back there at my machine and we talked about my operation and I told him that I wasn't satisfied with it. And he said, "Frankly, I'm not either.'

Q. Now, when you were told to go up to the other plant and report—you remember testifying to that?

A. Yes.

Q. Why didn't you go up there the next day?

A. Because I was with Lucille Yancey the morning that she asked Arthur Sharff about any of the employees being transferred to the pants department. And he said that no one would be transferred whatsoever. And after I had talked with him about—he told me that I either—I talked tc Morris, and he told me that I either had to get my production or else * * *."

(3) the reasons offered by Respondent for Ruth Brooks' discharge were that she did not produce enough. Contrary to the General Counsel's assertion, that her work was "on a par with other employees", the above excerpts from the testimony clearly indicate that her work was, in fact, below par, and (4) indicative of the fact that the Trial Examiner's assertion that this employee was beyond reproach actually misconstrues the testimony is revealed by the incident in the record which shows that this employee did at one time commit an act of insubordination. Ruth Brooks testified that she was instructed by her Employer to report to the pants plant for work the next morning. She admits that on that occasion she turned and walked off without making any reply and did not report to work the next morning as directed. Certainly, if the Employer were looking for an occasion or a reason to discharge an employee he was provided with a golden opportunity at this point. The fact is, however, that he wished to give Ruth Brooks a chance to prove herself and make production in

the pants plant, the facet of his operation which required less skill.

Further justification for the discharge of this employee, if justification is necessary, is the fact that the personnel of the pants plant fluctuated from forty-eight employees to nineteen employees, over a three to four month period, and that both of Respondents' operations were in the process of being moved into one building. Under such circumstances it is strange that an employee whose profile as a worker is graphically depicted above should be released. Indeed, it is strange that anyone could question the discharge or the fact that in this as in other instances the quality of mercy was in fact strained to the limit.

Finally, if we accept as true General Counsel's statement that this employee was "on a par" with other employees, and if we consider all Employer's actions in a framework of curtailed business operations and production cutbacks, necessitating a layoff, then these uncontradicted facts alone would be sufficient to justify the Employer's discharge of this employee. To permit the Trial Examiner to say that they do not is to allow his judgment to displace the sound and reasonable exercise of Respondents' business judgment. Such action on these facts cannot be justified.